

## REQUEST FOR APPROVAL

**To:** Mark Leary  
Acting Director

**From:** Howard Levenson  
Deputy Director, Materials Management and Local Assistance Division

**Request Date:** April 4, 2011

**Decision Subject:** Approval to Formally Notice Proposed Architectural Paint Recovery Program Regulations

**Action By:** April 12, 2011

---

**Summary of Request:** Staff requests approval to begin the formal rulemaking process and formally notice proposed Architectural Paint Recovery Program Regulations needed to implement the paint stewardship law ([Chapter 420, Statutes of 2010 \[Huffman, AB 1343\]](#)).

**Recommendation:**

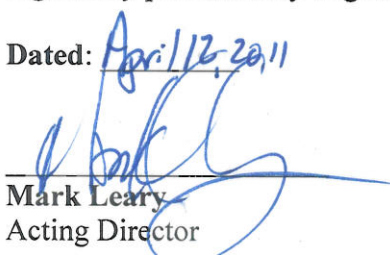
Staff recommends approval of the "Proposed Architectural Paint Recovery Program Regulations" so that the regulations may be forwarded to the Office of Administrative Law and the formal regulatory process can begin.

---

**Action:**

On the basis of the information and analysis in this Request for Approval and the findings set out above, I hereby approve the "Proposed Architectural Paint Recovery Program Regulations" and direct staff to forward the regulatory packet to the Office of Administrative Law so the formal regulatory process may begin.

**Dated:** April 12, 2011



Mark Leary  
Acting Director

**Attachments:** Proposed Architectural Paint Recovery Program Regulations

---

**Background Information, Analysis, and Findings:**

To implement Assembly Bill 1343 of 2010, the Department has responsibility to approve or disapprove of stewardship plans submitted by paint manufacturers or their designated product stewardship organization; review annual reports and adopt a finding of compliance or non-compliance, and provide oversight and enforcement to ensure a level playing field among all paint manufacturers. For manufacturers to be in compliance, they or their stewardship organization must have an approved plan on file with CalRecycle. Enforcement is addressed through a combination of civil penalties for non-compliance and transparency that allows all stakeholders and the public to evaluate progress. Additionally, paint manufacturers and/or stewardship organization(s) are required to pay CalRecycle an annual administrative fee sufficient to cover the department's full costs of administering and enforcing the law.

To carry out these responsibilities, the Department seeks to promulgate regulations that add clarity and establish administrative procedures covering: definitions; submittal instructions; stewardship plan approval criteria; annual report acceptance criteria; the establishment of a progressive enforcement approach; record keeping requirements; proprietary, confidential or trade secret information; and a process for CalRecycle to accept payment for its services related to oversight and enforcement activities.

Staff have met with numerous stakeholders and conducted a public workshop on March 10, 2011 to share and solicit feedback and guidance on the Department's informal draft regulatory text. Staff has considered these comments from the public and incorporated appropriate changes into the "Proposed Architectural Paint Recovery Program Regulations" (Attachment 1). The primary concerns expressed by stakeholders about the draft informal regulatory text and staff's response to these concerns are briefly summarized here:

- **Overarching Concerns About Scope of Financial Coverage:** Stakeholders expressed a concern whether CalRecycle would approve a stewardship plan whose financing mechanism does not cover the full costs of the program; specifically, if a stewardship organization does not negotiate payment for collection costs incurred by a local household hazardous waste program. As a result, staff made the following modifications: 1) added definitions for "collection", "operational costs", and "service providers" that clarify that the costs to collect from the consumer must be included in the program's operational costs, and 2) added a requirement for a manufacturer or stewardship organization to state that agreements with service providers address all operational costs. Concerns were raised regarding how the assessment collected in a jurisdiction will be used to provide service in that jurisdiction. Staff is conducting further research into this issue and will provide an update as part of the formal rulemaking process.
- **Definitions:** Stakeholders suggested modification of some definitions to more accurately reflect the intent of the regulation. Subsequently, staff has modified definitions for "assessment" and "brand". The suggestion to define "architectural paint" was not incorporated as this term is already defined in statute. Further, staff does not suggest limiting the scope of this definition, thereby allowing flexibility to cover new products/formulations over time. Consequently, specific references to "water and oil-based paint" were removed from the text.
- **Submittals:** A suggestion to remove the requirement for contact information for individual manufacturers participating in a stewardship organization was considered;

however, staff considers this basic information as necessary for maintaining compliance. Further, this suggestion prompted staff to recommend that this basic contact information be updated in the annual reports.

- **Stewardship Plan Approval Criteria:** Stakeholders suggested adding a description of paint container management. Staff added this criteria. The suggestion to clarify that the baseline for determining goals should indicate the current status of architectural paint management in the state was added. The comment that the posting of compliant manufacturers needs to be updated in a timely manner was acknowledged, and staff is working internally to ensure this occurs. Some stakeholders questioned whether it was appropriate to reference the solid waste management hierarchy. As the statute is consistent with CalRecycle's solid waste management hierarchy, staff considers the reference appropriate. A suggestion to specify that the current level of service provided in a jurisdiction must be maintained was not added, as the department determined that it does not have the statutory basis for this requirement.
- **Annual Report Acceptance Criteria:** Staff added a stakeholder suggestion to include a description of challenges the manufacturer or stewardship organization encountered and how they will be addressed. A requirement to report on the disposition of paint, by estimated volume, including facility names and addresses was added as a means to ensure proper end-of-life management. Staff considered a comment that this information is difficult to obtain from waste contractors, but respectfully disagree, as this requirement may be included via contractual arrangements. Staff did not agree with the request to delete reporting of market development activities, as this is optional and the reporting can include a description of activities that one or more manufacturers may undertake at some point in the future.
- **Retail Participation:** Stakeholders expressed concern regarding the potential for a manufacturer or stewardship organization to limit the number of retail collection points in a stewardship program. Staff added language under the sections on stewardship plans and annual reports to clarify that 1) retailers may participate on a voluntary basis, 2) the agreement must be mutually agreeable and reasonably feasible, and 3) the agreement must address all operational costs.
- **Enforcement:** Staff added "failure to meet record keeping requirements" to both penalty tables. Specific record-keeping requirements were also added.

After the CalRecycle public workshop on March 10, PaintCare publically discussed its work to-date in developing the stewardship program. At both the CalRecycle workshop and the PaintCare stakeholder consultation, stakeholders raised a number of additional issues related to program implementation. These included:

- Will the assessment be taxable?
- If a local Household Hazardous Waste Program participates in the program, does it still maintain liability for the materials in perpetuity or does this get transferred to the manufacturer or stewardship organization with which it contracts?

These are important issues that PaintCare will need to address, both in developing its program and in the stewardship plan it submits to CalRecycle. Depending on comments received from the public during the formal rulemaking process and on CalRecycle's own analyses, CalRecycle

also may need to address some of these issues within the regulations as well or provide guidance to the involved parties. For example, CalRecycle has already begun discussing the tax question with the Board of Equalization, which has informally indicated that the fee is taxable.

Approval of this "Proposed Regulations for Architectural Paint Recovery Program" Request would allow staff to file the regulatory package with the Office of Administrative Law (OAL), and, when that is published by OAL, to initiate the formal rulemaking process. CalRecycle staff anticipates that the formal process will begin in June 2011. The regulatory process is scheduled to be completed in January 2012. The law requires that stewardship plans be submitted by April 1, 2012 and approved by July 1, 2012 or three months after a stewardship plan is approved by CalRecycle. A tight schedule must be maintained to meet this deadline.